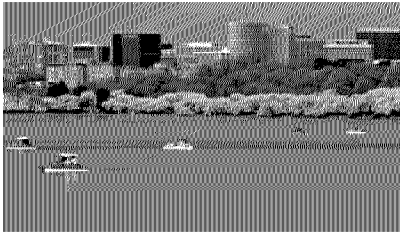


Water Law News for January 4, 2012
Mary Grady to: Steven Neugeboren
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01/04/2012 09:51 AM

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WATER LAW NEWS JANUARY 4, 2012

BNA, Inc.

Daily Environment

REPORT

HIGHLIGHTS

Drilling

New York Comptroller Proposes Fund To Clean Up Contamination From Fracking

ALBANY, N.Y.—New York State Comptroller Thomas P. DiNapoli (D) is urging the Department of Environmental Conservation (DEC) to establish an industry-supported fund to cover remedial costs for contamination that might result from...

Drilling

NOAA Fisheries Reviews Permitting For Arctic Drilling Impact on Mammals

ANCHORAGE, Alaska—The NOAA Fisheries Service has issued a proposal to govern the way oil companies operating offshore in the Arctic Ocean will be permitted to affect marine mammals....

Oil Spills

BP Asks Court to Dismiss Indemnity Motion, Says Halliburton Liable for Costs, Expenses

HOUSTON—BP has reiterated its claims that Halliburton Energy Services Inc. is responsible for costs and expenses incurred by BP to clean up and remediate the oil spill following the Deepwater Horizon explosion in the Gulf of Mexico...



Grappling With Cost Study, EPA Weighs New Delays For Stormwater Rule

EPA is struggling to estimate the costs and benefits of its first-time proposal for regulating stormwater runoff after construction at housing and other developments is completed, forcing officials into talks with environmentalists over a new schedule for the rulemaking.

EPA-Chicago Pact Fails To Satisfy NRDC Push For Strict Stormwater Limits

Environmentalists are mulling their legal options to amend a recent stormwater consent decree in Chicago, saying the agreement fails to incorporate an appropriate amount of green infrastructure and runs counter to recent national trends and an activist push calling for EPA to incorporate stormwater retention standards in an upcoming stormwater regulation.



OIL AND GAS:

House GOP pushes vulnerable Dems on Keystone XL

Jennifer Yachnin, E&E reporter

Published: Tuesday, January 3, 2012

The National Republican Congressional Committee called on 55 House Democrats today to support approval of the proposed Keystone XL pipeline to begin construction.

The Obama administration had put off a decision on the proposed 1,700-mile oil pipeline until after the 2012 elections while it studies alternative routes for the project, which would carry oil sands crude from Alberta to the Gulf Coast.

But late last month, Congress instituted a 60-day deadline for the administration to rule on a permit for the \$7 billion project, included in an agreement to extend a payroll tax cut through the beginning of 2012.

According to the NRCC release, Democratic lawmakers including North Carolina Rep. Heath Shuler are being urged to voice their

support for allowing the project.

"The widely popular Keystone XL pipeline project would provide North American energy and potentially create up to 130,000 associated jobs, which is why Shuler should call upon President Obama to approve these high-quality jobs and reject radical activists who would gladly see hundreds of thousands of jobs destroyed," the release states.

Environmentalists have vigorously opposed Keystone XL, citing risks for future spills as well as greenhouse gas emissions generated by the oil-sands fuel it would carry.

Nearly identical press releases were also issued in the congressional districts of Reps. Jason Altmire (Pa.), John Barrow (Ga.), Sanford Bishop (Ga.), Tim Bishop (N.Y.), Leonard Boswell (Iowa), Bruce Braley (Iowa), Lois Capps (Calif.), Russ Carnahan (Mo.), Kathy Castor (Fla.), Ben Chandler (Ky.), David Cicilline (R.I.), Gerry Connolly (Va.), Jim Cooper (Tenn.), Jim Costa (Calif.), Mark Critz (Pa.), Peter DeFazio (Ore.), John Garamendi (Calif.), Raúl Grijalva (Ariz.), Brian Higgins (N.Y.), Jim Himes (Conn.), Ruben Hinojosa (Texas), Kathy Hochul (N.Y.), Tim Holden (Pa.), Rush Holt (N.J.), Steve Israel (N.Y.), Bill Keating (Mass.), Ron Kind (Wis.), Larry Kissell (N.C.), Rick Larsen (Wash.), David Loebsack (Iowa), Jim Matheson (Utah), Carolyn McCarthy (N.Y.), Mike McIntyre (N.C.), Jerry McNerney (Calif.), Michael Michaud (Maine), Brad Miller (N.C.), Bill Owens (N.Y.), Frank Pallone (N.J.), Ed Perlmutter (Colo.), Gary Peters (Mich.), Collin Peterson (Minn.), Chellie Pingree (Maine), David Price (N.C.), Nick Rahall (W.Va.), Loretta Sanchez (Calif.), Kurt Schrader (Ore.), Adam Smith (Wash.), Betty Sutton (Ohio), John Tierney (Mass.), Paul Tonko (N.Y.), Niki Tsongas (Mass.), Pete Visclosky (Ind.), Tim Walz (Minn.) and John Yarmuth (Ky.)

WATER POLLUTION: EPA seeks more time for stormwater rule

Paul Quinlan, E&E reporter

Published: Tuesday, January 3, 2012

U.S. EPA is again requesting more time to propose sweeping new regulations of stormwater.

The agency is negotiating with the Chesapeake Bay Foundation over a new deadline for proposing "post-construction" rules for curbing pollution being washed by storms into waterways, CBF Vice President of Litigation Jon Mueller said in an emailed statement.

"Negotiations concerning a new timetable for EPA's post-construction stormwater regulations are currently underway, and the Chesapeake Bay Foundation will not comment on those negotiations until they are completed," Mueller said.

The foundation sued to force EPA to draft and propose the new rule, setting an original deadline of Sept. 30, 2011, to unveil the final product. EPA sought and received a two-month extension. That deadline lapsed last month.

The rules are expected to require that new houses and other buildings would be able to absorb rainfall as effectively as if the land had remained undeveloped. Prospects of such a rule have put the construction industry and its allies on Capitol Hill on edge.

Environmentalists say the new rules could deliver an invaluable boost to the quality and health of waterways.

Critics say the rule has the potential to be the most expensive ever proposed by EPA.

Last month, EPA water chief Nancy Stoner told a House subcommittee that the agency was "behind schedule" but declined to give a new timetable.

"We're continuing to work on those," Stoner said (*E&ENews PM* , Dec. 14, 2011).

CHESAPEAKE BAY: Far from impeding growth, restoration will create 230,000 jobs -- report

Paul Quinlan, E&E reporter

Published: Tuesday, January 3, 2012

Seeking to refute arguments that green regulations slow the economy, the Chesapeake Bay Foundation today said wastewater treatment plant upgrades and other federally mandated efforts to clean up the pollution-ravaged bay will create upward of 230,000 jobs.

By contrast, foundation President William Baker noted that congressional and industry backers of the highly controversial proposed Keystone XL oil pipeline say it would create 20,000 jobs across the entire United States.

"If 20,000 is significant for the nation as a whole, then 230,000 is extremely significant for a six-state region in the mid-Atlantic," Baker said in a phone interview this morning.

The report aims to head off congressional and industry attacks on President Obama's multibillion-dollar Chesapeake Bay restoration plan. The U.S. EPA-mandated cleanup plan aims to compel six states to curb fertilizer and wastewater pollution in order to put the bay on a healthy track by 2025.

The findings are also meant to debunk the broader argument -- crystallized, Baker said, in an August [memo](#) from House Majority Leader Eric Cantor (R-Va.) -- that environmental regulations impede economic growth.

Baker unveiled the report at a press conference this morning at Constellation Energy's Brandon Shores power plant in Anne Arundel County, Md., where air pollution scrubbers installed to comply with a 2006 state law created 1,500 temporary jobs and 32 new, full-time positions at the plant.

"And the rates didn't go up a penny," Baker said. "We think it's a good example of how the projections of Armageddon from environmental regulation -- no matter what they are -- are often just a bunch of hot air."

But one opponent dismissed the report out of hand.

"If more regulations created jobs -- then the Obama administration's track record should be explosive economic growth and full employment," said Don Parrish, senior director of regulatory relations for the American Farm Bureau, in an email.

The release of the report puts the Chesapeake Bay Foundation in league with numerous other prominent environmental groups that are releasing economic studies to argue that spending on environmental restoration of imperiled ecosystems such as the Everglades and the Great Lakes yields several times as much in economic benefits in the form of construction jobs and fishing, tourism and real estate industry gains.

Most of the more than 230,000 jobs projected to come to the states in the bay watershed -- Delaware, Maryland, New York, Pennsylvania, Virginia and West Virginia -- and the District of Columbia would result from stormwater treatment plant upgrades.

That includes 178,000 full-time jobs over the next five years, including 36,000 jobs in Maryland, 10,000 in the District of Columbia, 80,000 in Pennsylvania and 52,000 in Virginia, according to projections by the Economic Policy Institute.

More jobs would follow as a result of several major sewage plant upgrades projected across the region, as well as implementation of pollution and runoff-control practices at some of the region's tens of thousands of farms, the report says.

Another 11,751 temporary jobs are expected to be created over five years if the Virginia and federal governments invest \$804 million in tree-planting, fence building and other farm runoff-blocking projects to meet bay restoration goals, according to a cited University of Virginia report.

"It is difficult to predict exactly how many job opportunities will spring up because of projects driven by the Chesapeake Bay pollution limits," the CBF report says. "Innovation will likely inspire the birth of a wide variety of new firms that will hire employees for everything from pollution-credit trading, to building high-tech barns, low-runoff housing developments, green roofs, and stormwater-control systems that look like gardens beside the road."

OIL AND GAS:

Ohio closes wastewater storage wells after quakes

Published: Tuesday, January 3, 2012

Ohio has ended or suspended development of five deep wastewater disposal wells by natural gas drillers over fears that a series of earthquakes in the state may have been triggered by the activity.

The largest earthquake, which hit on New Year's Eve, was magnitude 4.0 and centered close to a 9,000-foot-deep well being operated by D&L Energy Group.

The well is filled with brine and wastewater from drilling activity in the Marcellus Shale in Pennsylvania.

The Ohio Department of Natural Resources halted operation of that well and the development of four additional wells within 5 miles.

"We can't say for sure that it's linked to the well, but we'll keep the operations shut down for an indefinite period until we can get an accurate picture of what's going on here," said Andy Ware, Ohio DNR deputy director.

The Ohio Oil and Gas Association, speaking for D&L, said the earthquake was likely a rare and isolated event, but they supported closing the well for the sake of residents' peace of mind.

Won-Young Kim, a professor of seismology geology and tectonophysics at Columbia University's Lamont-Doherty Earth Observatory, who examined the earthquake, said the pattern was similar to ones seen near other deep injection wells in Ohio and Colorado (Don Hopey, [Pittsburgh Post-Gazette](#) , Jan. 3). -- **GV**

OIL AND GAS:

EPA lab report shows flaws in Wyo. water study

Published: Tuesday, January 3, 2012

U.S. EPA improperly analyzed water samples in a controversial draft report that suggested a possible link between tainted water in Wyoming and the natural gas drilling technique of hydraulic fracturing, according to the agency's recently released lab report.

Water samples taken from six private drinking water wells and two EPA-drilled deep monitoring wells were not tested quickly enough after they were taken in April 2011. "Maintenance of the laboratory floor" at the agency's facility in Golden, Colo., caused the hold, according to EPA's lab data report. Such outdated samples would normally be replaced with fresh samples, but EPA did not do that. Instead, estimates of the sample data were included in the draft report.

"Basically, if you want to have valid laboratory results, you want to have them sampled within that certain time period," said Keith Clarey, a professional geologist and water development commission program manager for the state of Wyoming.

Clarey also said EPA relied on too few samples.

"Statistically you need to have 8-10 data points at a minimum," he said. "To only have those two -- it's not really a scientifically valid study."

EPA also found water contamination in pure water control samples, did not purge the test wells correctly before collecting samples and did not mention in its report whether it tested water transported by a truck used in well drilling, water well experts with the Wyoming Water Development Commission said.

"They didn't follow their own protocol they would've required of other people doing this same type of work," said Mike Purcell, director of the commission staff (Jeremy Fugleberg, Casper [Wyo.] Star-Tribune , Dec. 27).

Meanwhile, in Pennsylvania EPA officials are also reopening their review of water supplies in Dimock Township after seeing the results of a natural gas drilling contractor's latest round of tests on water wells that state regulators found to have been tainted with methane by the company.

After a preliminary review of water test results taken by Cabot Oil and Gas Corp., EPA told Dimock Township residents the information "does not indicate that the well water presents an immediate health threat to users" in early December.

But during a visit last week, EPA said the new information "merit[s] further investigation." EPA is now "concerned about" potential gaps in water sampling and test results, the number of water supplies possibly affected, whether residents have alternate sources of fresh drinking water, and if residents can provide further data, according to an information sheet officials provided to residents.

Test results of residents' water supplies done by Cabot were marked confidential in litigation between the company and 11 of the affected families but were released in early December after a preliminary review by EPA. Those tests, taken in August and September, showed elevated levels of metals and bis(2-ethylhexyl) phthalate. They also detected other chemicals in the drinking water wells, including glycols, which are used in antifreeze, surfactants and the solvent 2-methoxyethanol (Laura Legere, Scranton [Pa.] Times-Tribune , Dec. 31). -- AS

OIL AND GAS:

BP not criminally negligent in 2009 Alaska spill

Published: Tuesday, January 3, 2012

A federal judge in Anchorage last week rejected an effort by prosecutors to hold BP PLC criminally negligent for a 2009 pipeline rupture that released about 15,000 gallons of crude into a frozen wetland on the North Slope.

U.S. District Judge Ralph Beistline's ruling followed seven days of hearings -- essentially a mini-trial -- over allegations that BP violated probation conditions set in 2007 for Clean Water Act violations associated with a 250,000-gallon spill. In his ruling last week, Beistline released BP from probation for that spill. The Justice Department and U.S. EPA sought to have the 2007 probation revoked and reinstated with new conditions, including additional fines and an extended period of compliance.

In the 2009 spill, operators of a transport pipeline that was plugged with ice failed to address repeated alarms that sometimes lasted for months, prosecutors argued. But BP said it was not negligent because its workers had followed normal procedures and that the line was engineered properly. The company also tried to shut the case down over a technicality, claiming the tainted wetland was not "federal waters," a prerequisite for a Clean Water Act violation.

Beistline rejected the technicality but agreed with BP on the question of negligence.

"While the Court would prefer a fail-safe system where accidents never happen, it recognizes that human beings and engineering practices are not perfect and that, on occasion, unexpected or unanticipated accidents can and will happen," he wrote. "In the instant case, the Court concludes, based on the evidence presented, that BP was following accepted industry practices at all relevant times and could not have reasonably expected a blowout similar to the one that occurred on November 29, 2009" (Richard Mauer, Anchorage Daily News , Dec. 28). -- AS

GULF SPILL:

Prosecutors prep criminal charges against BP as firm sues Halliburton

Published: Tuesday, January 3, 2012

U.S. prosecutors are working on what would be the first criminal charges against BP PLC employees related to the 2010 Deepwater

Horizon accident, which killed 11 workers and created the worst offshore oil spill in U.S. history, according to people familiar with the matter.

The focus is on several Houston-based engineers and at least one of their supervisors, who prosecutors say may have provided false information to regulators about the risks associated with the Gulf of Mexico wells, these sources say. A conviction on charges of providing false information on federal documents carries a penalty of up to five years in prison and a fine.

The Department of Justice has not decided on whether to bring charges against the individuals, these sources say. It is not unusual for prosecutors to use the threat of charges to pressure people into cooperation with an investigation.

Legal experts predict BP will face broader criminal charges, including violation of the federal Clean Water Act. The company is already appealing administrative fines levied by U.S. regulators that could reach as high as \$36.6 million.

Criminal charges have been brought in previous oil spills, including the 1989 *Exxon Valdez* accident, in which an Exxon oil tanker hit a reef off the coast of Alaska, spilling 11 million gallons of crude. Exxon, now Exxon Mobil Corp., faced five criminal charges, including two felonies and three misdemeanor charges of violating the Migratory Bird Treaty Act and the Clean Water Act. The only individual charged in the case was the captain of the tanker, Joseph Hazelwood, who was accused of three felonies and a misdemeanor charge of negligently discharging oil. A jury convicted him only of the misdemeanor and he was sentenced to 1,000 hours of community services and \$50,000 in restitution (Tom Fowler, *Wall Street Journal* , Dec. 29).

Meanwhile, BP is calling on contractor Halliburton, which cemented the failed Macondo well, to pay all costs and expenses related to the cleanup of the Gulf spill.

In a U.S. court filing, BP said it was suing to recover costs from cleaning up the spill, lost profits and "all other costs and damages incurred by BP related to the Deepwater Horizon incident and resulting oil spill."

It is not clear how the suit differs from one brought last April, in which BP asked a court to award damages "equal to, or in the alternative proportional to Halliburton's fault," to cover cleanup costs and government fines faced by BP.

BP has spent \$14 billion in the Gulf Coast region to respond to the spill and has set aside \$20 billion for economic claims and natural resource restoration, its website says.

BP has already reached deals with its two partners in the Macondo well, Anadarko and Mitsui, and last month Cameron International Corp. agreed to a \$250 million settlement with BP to help pay for costs associated with the spill. But settlement agreements with the two remaining parties -- Halliburton Co. and Transocean Ltd. -- have proven elusive thus far ([AP/Yahoo News](#), Jan. 3). -- AS

WATER POLLUTION: Enviros sue Ky. coal company over selenium pollution

Manuel Quinones, E&E reporter

Published: Tuesday, January 3, 2012

Environmental groups filed a federal lawsuit last week against Laurel Mountain Resources LLC for alleged violations of the Clean Water Act at a mine in Kentucky.

The Sierra Club and Kentuckians for the Commonwealth are accusing Laurel Mountain Resources of illegal selenium dumps from the Bear Hollow mine in Johnson County. Their complaint alleges eight illegal selenium dumps between January and March and says the company has not done enough to prevent further discharges.

"Until state officials step up and enforce the law, citizens will continue to have to bring actions like these to protect our streams," said Mary Love, a Kentuckians for the Commonwealth activist, in a statement. "Selenium is a toxic pollutant, and mines should not be allowed to dump it in our streams."

In October, environmentalists threatened Laurel Mountain with a lawsuit if it did not take action to fix pollution problems ([Greenwire](#) , Oct. 28, 2011).

Attorneys with Appalachian Mountain Advocates based in West Virginia are representing the groups. In recent months, they have secured million-dollar settlements with Arch Coal Inc. and Alpha Natural Resources Inc. for alleged selenium discharges from company mines ([Greenwire](#) , Dec. 12).

Laurel Mountain managers could not be reached for comment in time for publication.

In a separate case, the Sierra Club and KFTC are appealing a Kentucky water discharge permit for Beech Fork Processing Inc.'s coal mine and processing facility also in Johnson County.

Attorneys say the permit, which became effective on Jan. 1, is not tough enough to prevent stream pollution. Among numerous complaints, they argue that the permit should include limits on conductivity, a barometer of water health.

U.S. EPA also registered concerns.

In written comments to EPA and environmentalists, Kentucky regulators defended the permit and say it includes monitoring requirements for conductivity.

LAW:

Court faults enviro review of controversial Mont. coal railroad project

Lawrence Hurley, E&E reporter

Published: Tuesday, January 3, 2012

A federal appeals court ruled late last week that the federal government needs to take a closer look at the potential environmental impacts of a proposed 130-mile railroad project that would transport coal through Montana.

The San Francisco-based 9th U.S. Circuit Court of Appeals said the federal Surface Transportation Board (STB) had failed to carry out the required "hard look" at several environmental issues raised by the Tongue River Railroad project as required under the National Environmental Policy Act.

STB approved the project -- backed by the Tongue River Railroad Co. -- in 2007 over the objection of conservation groups, including the Northern Plains Resource Council, and local ranchers.

The railroad in southeastern Montana would haul coal from new mines in the Ashland area to the main line at Miles City. Opponents of coal mining have sought to derail the railroad project as part of a multi-pronged strategy to prevent further coal development, particularly at the proposed Otter Creek mine.

Thursday's ruling means STB will now have to carry out a new environmental review before the railroad project can proceed.

"It's basically back to square one" in terms of the environmental analysis, said Patrick Parenteau, a law professor at Vermont Law School who is assisting the challengers. He predicted it would be "two years or more" before STB issues a new decision.

Writing for a unanimous three-judge panel, Judge Milan Smith wrote that STB failed to take into account the cumulative impact of the railroad when combined with anticipated coalbed methane development and new coal mining at Otter Creek.

The Tongue River Valley is expected to be an epicenter of coalbed methane development. STB had concluded that the projects would only commence after the construction of the railroad, meaning there would be no cumulative effects within a five-year timeframe.

"The board's assumption that the railroad would be constructed and operational within five years of approval in 2007 is clearly flawed in light of the history of this railroad project, which has been under way for almost three decades," Smith noted.

Likewise, the board's decision not to analyze the coalbed methane proposals in any depth -- in part because they are not finalized yet -- did not pass muster with the court.

The board "has not sufficiently explained why it cannot or should not incorporate" data that is already available about proposed development, Smith wrote.

As for the Otter Creek mine, the court dismissed STB's view that it was "not foreseeable" that development there was imminent, in large part because the the board "relied on the coal mine development in Otter Creek to justify the financial soundness of the proposal."

The court also found fault with some of the baseline data on plants and wildlife used by STB, concluding that the board had failed to collect enough information in some instances or had relied on old data.

STB and a lawyer for the railroad company did not respond to requests for comment.

[Click here](#) to read the ruling.

ClimateWire -- Wed., January 4, 2012 -- [Read the full edition](#)

1. MEDIA: U.S. climate coverage fell last year while strange weather set records

Amid a historic drought in Texas, a presidential election and a year of record-breaking extreme weather events, multiple studies show news coverage of climate change took a steep plunge in 2011. "This is really a very low point," said Robert Brulle, a professor of environmental policy at Drexel University. Brulle, who has been following television news coverage of climate change for decades, found that the number of stories on climate change in the three nightly news broadcasts fell by more than half last year.

2. RENEWABLE ENERGY: Scientists work to help electric utilities forecast and handle 'ramp events'

Wind energy is notoriously mercurial, with patterns shifting drastically over the course of years, days, even minutes. These changes make scheduling power much more difficult for utilities that rely on wind turbines to serve an increasing percentage of their power demands. So scientists are stepping in with new measurements and models that may help them manage their power more effectively.

TODAY'S STORIES

3. HEATING: Sales of old, smoky wood-burning stoves appear to rise in poor areas

4. NATURAL GAS: Devon, Chesapeake buttress capital spending as China takes stake in Ohio shale

5. MIGRATION: Planning is needed to ease people movement associated with climate changes -- study

- 6. DROUGHT: A dry start to Calif.'s wet season
 - 7. OCEANS: San Francisco's sea walls, built to repel the ocean, draw fire from the mainland
 - 8. ELECTRIC VEHICLES: Citing battery problems, Fisker pulls hybrid sports car off the market
 - 9. EVOLUTION: First hybrid sharks discovered near Australia
- E&ETV's OnPoint**
- 10. ENERGY POLICY: American Academy of Arts and Sciences' Fri talks strengthening policy through social science

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